Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PAUL INGERSON,

Petitioner,

v.

TWENTIETH CENTURY FOX FILM CORPORATION, ET. AL.,

Respondents.

On Petition For Writ of Certiorari
To The California Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On behalf of the general public, petitioner filed suit under California's private attorney general statute, seeking relief based on respondents' misappropriation of petitioner's likeness in a reality show on national television. Respondents argued that the First Amendment limits liability under California's private attorney general statutory scheme, as well as liability for misappropriation, only to commercial speech cases. The lower courts dismissed the case because respondents used petitioner's likeness to discuss a matter of public interest (drug use in America).

The question presented in this case, as to which appellate courts across the nation are in conflict, is as follows:

Whether the media may escape misappropriation liability under the First Amendment when using a plaintiff's likeness to discuss topics of general interest without having to establish that their use of plaintiff's likeness was integral to a full understanding of the topic itself.

RULE 14.1(b) STATEMENT

Pursuant to Supreme Court Rule 14.1(b), petitioner Paul Ingerson states that he is the only petitioner in this court and the lower courts. Twentieth Century Fox Film Corporation and Langley Productions Inc. are the respondents here and in the lower courts.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... (I)

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 4

I. APPELLATE COURTS ACROSS THE COUNTRY ARE IN CONFLICT AS TO THE CORRECT BALANCING TEST FOR APPLICATION OF THE FIRST AMENDMENT DEFENSE IN MISAPPROPRIATION CASES 4

II. THE COURT OF APPEAL'S DECISION IN THIS CASE TOTALLY CONFLICTS WITH THIS COURT'S DECISION IN *ZACCHINI*..... 7

III. THE FIRST AMENDMENT ISSUES RAISED IN THIS CASE AFFECT LITIGANTS ACROSS THE COUNTRY ON A DAILY BASIS..... 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases:

44 Liquormart, Inc. v. Rhode Island
517 U.S. 484 (1996).....1

Army & Air Force Exchange Service v. Sheehan
456 U.S. 728 (1982).....9

Barber v. Time Inc.
159 S.W.2d 291 (Mo. 1942) 7

Braen v. Pfeifer Transportation Co.
361 U.S. 129 (1959) 9

Comedy III Productions Inc. v. Gary Saderup Inc.
21 P.3d 797 (Cal. 2001).....8-9

Commonwealth v. Wiseman
249 N.E.2d 610 (Mass. 1969) 7

Doe v. Mills
536 N.W.2d 824 (Mich. Ct. App. 1995).....7

Doe v. Univision Television Group Inc.
717 So.2d 63 (Fla. Ct. App. 1998).....7

Dora v. Frontline Video Inc.
15 Cal. App. 4th 536 (Cal. Ct. App. 1993).....5-6

Downing v. Abercrombie & Fitch
(9th Cir. 2001) 265 F.3d 994 5-6

Fuller v. Oregon
417 U.S. 40 (1974) 10-11

Gionfriddo v. Major League Baseball
94 Cal.App.4th 400 (Cal. Ct. App. 2001) 5

Kasky v. Nike, 45 P.3d 243 (Cal. 2002), cert. granted
sub nom. Nike v. Kasky (Jan. 10, 2003)
123 S.Ct. 817 ..... 3, 11

Kosydar v. National Cash Register Co.
417 U.S. 62 (1974) 11

Martinez v. Court of Appeal of Cal.
528 U.S. 152 (2000) 6

Morse v. Studin
725 N.Y.S.2d 93 (App. Div. 2001) 6

Olmstead v. Zimring
527 U.S. 581 (1999) 10

United States v. Estate of Romani
523 U.S. 517 (1998) 6

Vassiliades v. Garfinckel's, Brooks Bros.,
492 A.2d 580 (D.C. Ct. App. 1985) 7

Zacchini v. Scripps-Howard Broadcasting Co.
433 U.S. 562 (1977) 4, 7-9

Constitutional Provisions:

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV, § 1 1

Statutes:

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2403(b) 2

California Business & Professions Code § 17200 1

California Business & Professions Code § 17209..... 2

California Civil Code § 3344 3

Rules:

Sup. Ct. R. 29.4(c) 2

Sup. Ct. R. 10(b) 6

Treatises:

J. Thomas McCarthy, *Rights of Publicity and Privacy*, § 6:1 (2nd edition, rev. 2003) 10

J. Thomas McCarthy, *Rights of Publicity & Privacy*, § 7:20 (2nd ed., rev. 2003) 9

PETITION FOR WRIT OF CERTIORARI

Petitioner Paul Ingerson ("Ingerson") respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The decision of the California Court of Appeal (App., *infra*, 1-22) is not reported. The order of the Supreme Court of California denying discretionary review (App., *infra*, 25) is also not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The California Supreme Court denied discretionary review of this case on April 9, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." U.S. Const. amend. I. The First Amendment applies to the States under the Due Process Clause of the Fourteenth Amendment which provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489, fn.1 (1996).

California's private attorney general statute (commonly known as Unfair Competition Law or "UCL") provides in relevant part: "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice[.]" Business & Professions Code § 17200.

California's misappropriation statute makes it "unlawful" within the meaning of UCL to use a person's likeness without consent as follows: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."

California Business & Professions Code § 17209 requires parties to serve their briefs on the California Attorney General and the District Attorney. All parties have complied with this statute. Based on 28 U.S.C. § 2403(b), petitioner has also complied with Sup. Ct. R. 29.4(c).

STATEMENT

Respondents Twentieth Century Fox Film Corporation and Langley Productions Inc. (hereinafter collectively called "Fox") produce and broadcast a reality show called *Cops*. The show is broadcast on Fox television network and also in syndication. As reflected in its name, the entire show depends on respondents' use of non-celebrity individuals' likeness as they interact with police officers during their so-called police "investigations". The show generates substantial profits for respondents based on sales, syndication and merchandising revenues that respondents obtain by systematically using non-celebrities' likeness, voice and photograph without any compensation whatsoever. *Cops* also generates revenues based on advertisements and promotional content as shown between different segments of each episode.

Plaintiff Paul Ingerson has always been a private figure. (Clerk's Transcript [CT] 57, ¶ 7.) In late 1980s, Fox filmed and broadcast Ingerson's arrest for an attempted drug

deal (CT 70, ¶ 9) without Ingerson's consent.[1] (CT 172, ¶¶ 2-7.) Fox has admitted that, from 1990 to 1999, it broadcast Ingerson's segment as many as 15 times. (CT 123.) It is also undisputed that Ingerson's segment constitutes as much as 20% of his episode on *Cops* (Appellant's Reply Brief 9.)

Ingerson, on behalf of the general public, brought this consumer protection action under California's private attorney general statute (UCL). Ingerson alleged that Fox violated the unlawful prong of UCL by violating Civil Code section 3344 (California's misappropriation statute). Ingerson requested an injunction under UCL, requiring Fox to include a date-stamp on future broadcasts of *Cops* to avoid such confusion by viewers. (CT 66.) Just as in *Kasky v. Nike*, 45 P.3d 243 (Cal. 2002), cert. granted *sub nom. Nike v. Kasky* (Jan. 10, 2003) 123 S.Ct. 817, Ingerson also sought to disgorge Fox's revenues under UCL.

The trial court granted Fox's summary judgment motion as to the entire action. The trial court held that, as a matter of law, Fox's conduct was protected by free speech. (CT 213.) Relying extensively on the California Supreme Court's interpretation of the First Amendment in *Nike Inc. v. Kasky*, defendants argued on appeal that section 3344 and UCL can only apply to commercial speech. (Respondents' Brief 8-14; 21-26.) "To hold otherwise would violate the First Amendment." (Respondents' Brief 14.) The California Court of Appeal affirmed the trial court's summary judgment order (App., *infra*, 23) based on the media's free speech rights despite these admissions by the executive producer of *Cops*:

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1. A copy of the videotape footage of Ingerson (as depicted on the reality show *Cops*) was filed with the California Court of Appeal.

> "Under the First Amendment, news corporations can air anything and say, 'Hey, this is the news', but as documentarians, we're not considered to be the news," says Langley [*Cops'* executive producer]. Sean Bacall, Making Crime Pay, *Realscreen*, April 1, 1998, page 20 (quoting *Cops'* executive producer) (all quotation marks in original).

REASONS FOR GRANTING THE PETITION

Since its inception, this Court has issued only a single opinion regarding misappropriation. That decision, *Zacchini v. Scripps-Howard Broadcasting Co.* 433 U.S. 562, 574 (1977), has generated an emerging law in this area like a runaway train with new decisions, reaching diametrically opposed results, appearing with frightening rapidity. As explained below, while some courts have applied a two-prong test to evaluate the First Amendment defense in misappropriation cases, other courts apply a one-prong test. Because this issue is purely a legal one, this Case presents this Court with a perfect opportunity to resolve the ever-increasing conflict in lower courts over this important issue of federal constitutional significance.

I. APPELLATE COURTS ACROSS THE COUNTRY ARE IN CONFLICT AS TO THE CORRECT BALANCING TEST FOR APPLICATION OF THE FIRST AMENDMENT DEFENSE IN MISAPPROPRIATION CASES.

Some courts apply a two-prong test to evaluate the application of the First Amendment in misappropriation cases. In contrast, other courts apply a one-prong test as did the court of appeal in this case. A perfect illustration of this conflict is illustrated in California appellate courts'

interpretation of the First Amendment.

Courts applying a one-prong test merely ask whether the topic of the defendant's discussion (where plaintiff's likeness has been used) was a matter of public interest. If so, the defendant automatically prevails as a matter of law under the First Amendment. See, e.g., *Dora v. Frontline Video Inc.*, 15 Cal. App. 4th 536, 546 (Cal. Ct. App. 1993) (refusing to find liability under California's misappropriation statute because the topic of surfing is a matter of public affairs and, as such, constitutionally protected).

Other cases, however, impose a two-prong test. In addition to the first prong (whether the topic itself is protected), these courts require defendants to show that their use of plaintiff's likeness was also integral to a full understanding of the topic. See, e.g., *Gionfriddo v. Major League Baseball*, 94 Cal.App.4th 400, 411 (Cal. Ct. App. 2001) (first addressing whether the topic of defendants' discussion was a matter of public affairs and then evaluating whether the use of plaintiff's name was also "integral" to a full understanding of that discussion). Likewise, in *Downing v. Abercrombie & Fitch* (9th Cir. 2001) 265 F.3d 994, the Ninth Circuit applied this two-prong test. With respect to the first prong, the Ninth Circuit first acknowledged that "the theme of [defendant's] catalog was surfing and surf culture, a matter of public interest." *Id.* at 1002. Nonetheless, the court rejected defendant's free speech argument based on the second prong of the test as follows: "We conclude that the illustrative *use* of [plaintiffs'] photograph does not contribute significantly to a matter of the public interest and that [defendant] cannot avail itself of the First Amendment defense." *Id.* (Emphasis added.)

Ironically, both *Dora* and *Downing* involved the use of plaintiffs' likeness to discuss the very same topic (surfing). *Dora* and *Downing* reached opposite conclusions on the same issue, thereby illustrating the extreme conflict between appellate courts. In sum, in contrast to the lower court in the instant case, the Ninth Circuit applied a two-prong test in *Downing* to balance plaintiff's misappropriation claim with the First Amendment. The opinion below was thus decided "in a way that conflicts with the decision . . . of a United States court of appeals," thereby requiring review by this Court. (Sup. Ct. R. 10(b)). See, e.g., *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 155 (2000) (certiorari granted because petitioner "has raised a question on which both state and federal courts have expressed conflicting views"); *United States v. Estate of Romani*, 523 U.S. 517, 521 (1998) (certiorari granted because "[t]he decision of the Pennsylvania Supreme Court conflict[ed] with two federal court of appeals decisions").

Likewise, courts in other jurisdictions are in conflict regarding this issue in terms of the correct balancing test under the First Amendment. As pointed out by Fox, some courts refuse to impose liability when the topic of defendants' discussion involved a matter of public interest (first prong). These courts do not impose the second prong of the test as to whether the defendant's use of plaintiff's likeness must also be integral to a full understanding of the topic of discussion. See Respondents' Brief, p. 32 (citing cases outside California); but see *Morse v. Studin* 725 N.Y.S.2d 93 (App. Div. 2001) (patient's permission to plastic surgeon to use her "before and after" photos for educational purposes did not allow use in surgeon's promotional newsletters which thereby violated New York's misappropriation statute); *Doe v.*

Univision Television Group Inc. 717 So.2d 63 (Fla. Ct. App. 1998) (while the subject of badly done plastic surgery was a matter of public interest, the identification of plaintiff was not); *Doe v. Mills*, 536 N.W.2d 824, 830 (Mich. Ct. App. 1995) (while the subject of abortion is a matter of public interest, the identification of plaintiff was not); *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 589 (D.C. Ct. App. 1985) (while the public has a right to know about medical surgeries, it was unnecessary for physician to publicize his patient's photos in a lecture in a department store and on television); *Barber v. Time Inc.* 159 S.W.2d 291, 295 (Mo. 1942) ("While plaintiff's ailment may have been a matter of some public interest because unusual, certainly the identity of the person who suffered this ailment was not."); *Commonwealth v. Wiseman,* 249 N.E.2d 610, 617 (Mass. 1969) ("Recognizable pictures of individuals [in a documentary about mental institutions] were not essential.").[2]

In light of this extreme conflict, review is urgently needed to finally resolve this dichotomy in First Amendment case law.

II. THE COURT OF APPEAL'S DECISION IN THIS CASE TOTALLY CONFLICTS WITH THIS COURT'S DECISION IN *ZACCHINI.*

Just as the First Amendment does not license the theft of one's intellectual property rights, the First Amendment

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2. Even in public-disclosure-of-private-fact cases where the law is admittedly much more media-friendly than for misappropriation, such courts have found the media liable despite the fact that the defendant was discussing a matter of public interest. This is all the more reason to reject Fox's arguments in this case involving misappropriation.

cannot be used to license the theft of plaintiff's likeness and his property interest in controlling the use of his likeness. For that reason, this Court rejected the defendant's attempt in *Zacchini* to invoke the First Amendment as a defense.

Zacchini concerned a local television station's news coverage of an entertainment show at a county fair. At the fair grounds, plaintiff Zacchini, the "human cannonball," was presenting his act in which he was shot from a cannon into a net some 200 feet away. The actual shooting part of the performance lasted only fifteen seconds, and the local TV station videotaped and broadcast it on the eleven o'clock news.

Zacchini sued the television station for damages and unjust enrichment for reproducing his live performance without permission. The Ohio courts held that while this was an actionable appropriation, it was privileged as a news report of a matter of legitimate public interest. This Court reversed, holding that defendants cannot possibly use the First Amendment as a guise to avoid liability.

In *Zacchini*, this Court emphasized that a "state-law right of publicity would not serve to prevent [the media] from reporting the newsworthy facts about [plaintiff]." *Zacchini*, 433 U.S. at 574. The Court reached its holding by distinguishing misappropriation from other privacy torts. *Id.* at 573. The court reasoned that the whole reason for having a state law against misappropriation is to protect the plaintiff's right to control the use of his likeness in the same way copyright law protects one's intellectual property rights. Likewise, the California Supreme Court recently reaffirmed that "[t]he right of publicity, like copyright, protects a form of

intellectual property . . ." *Comedy III Productions Inc. v. Gary Saderup Inc.*, 21 P.3d 797, 804 (Cal. 2001).

The present case raises the identical concerns raised in *Zacchini*. Just as in that case, it is undisputed that petitioner Ingerson has a statutory right under California's misappropriation statute to control the use of his likeness by Fox in its reality show. Nonetheless, the court ruled for Fox because Fox used Ingerson to discuss a matter of public interest (drugs). The fallacy of the court's "reasoning" is this: if all it took for a defendant to escape liability in a misappropriation case was to discuss a matter of public interest using plaintiff, then "the First Amendment would be the vehicle for legalizing commercial theft." J. Thomas McCarthy, *Rights of Publicity & Privacy*, § 7:20 (2nd ed., rev. 2003) (internal citation omitted). Despite Ingerson's reliance on *Zacchini* (Appellant's Opening Brief 40-43), the court below affirmed judgment in favor of Fox, rendering a decision that directly conflicts with this Court's opinion in *Zacchini*.

This Court has repeatedly granted petitions for certiorari to review decisions that "appeared to be in conflict with our precedents" (*Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982)) or where the decision below "seemed to be out of line with the authorities." *Braen v. Pfeifer Transportation Co.*, 361 U.S. 129, 130 (1959). Accordingly, this petition should be granted.

III. THE FIRST AMENDMENT ISSUES RAISED IN THIS CASE AFFECT LITIGANTS ACROSS THE COUNTRY ON A DAILY BASIS.

Regardless of any conflict between appellate courts, this Court can also grant certiorari due to "the importance of the question presented to the States and affected individuals" (*Olmstead v. Zimring*, 527 U.S. 581, 596 (1999)). The decision below warrants this Court's review under this criterion as well.

As pointed out by the leading treatise on this topic, "[t]oday, recognition of the rights of privacy in some form is nearly unanimous among the states, either at common law or by statute. Also, at the present time, the right of publicity has been recognized in some form at common law or by statute by half of the states." J. Thomas McCarthy, *Rights of Publicity and Privacy*, § 6:1 (2nd edition, rev. 2003). In addition to those states providing a common law cause of action for misappropriation, eighteen states provide a statutory cause of action for misappropriation: California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. Some states provide both causes of action (as in California). Only this Court can establish a national balancing test to evaluate the tension between misappropriation claims and the First Amendment. A uniform understanding of the proper test is critical in order to delineate permissible uses of a person's likeness for courts throughout the entire nation. This is especially true for misappropriation cases due to lack of any guidance by this Court over the past 26 years on this particular cause of action (as opposed to other privacy torts

such as public disclosure of private facts, defamation, etc.).

Consequently, in addition to the conflict previously identified, a definitive ruling by this Court is especially warranted in this First Amendment case "because of the importance of the question presented." *Fuller v. Oregon*, 417 U.S. 40, 42 (1974). This court has previously granted certiorari in cases that "seemed to present important questions touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974). Therefore, this petition should be granted to resolve the proper balancing test between the First Amendment and state laws on the right of publicity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 20, 2003

APPENDIX A

CALIFORNIA COURT OF APPEAL OPINION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

PAUL INGERSON, B152689; B153595

Plaintiff and Appellant,

v.

TWENTIETH CENTURY FOX FILM CORPORATION et al.,

Defendants and Respondents.

[Court Seal: Court of Appeal, Second District, Joseph A. Lane, Clerk, Deputy Clerk, Filed January 21, 2003]

APPEALS from a judgment and post-judgment order of the Superior Court for the County of Los Angeles, (Los Angeles County Super. Ct. No. BC241596). J. Stephen Czuleger, Judge. Affirmed.

Law Offices of Robert Cooper and Robert Cooper for Plaintiff and Appellant.

Akin, Gump, Strauss, Hauer & Feld, Rex S. Heinke and Jessica M. Weisel for Defendants and Respondents.

An individual, whose 1989 endeavor to purchase illegal drugs was exposed to the police, captured on film by a camera crew, and televised repeatedly over the next decade on a reality-based television show, sued the show's producers. Among other things, plaintiff alleged defendants appropriated his right of privacy by broadcasting his voice without his consent, and violated the state's unfair competition law by failing to reveal to the viewing public the date on which the events transpired, thereby tending to mislead viewers that plaintiff remained engaged in illegal drug use. The producers moved for and were granted summary judgment. Later, the court ordered plaintiff to pay the producers' litigation costs. Plaintiff filed separate appeals from the judgment and the order awarding costs. For reasons discussed below, we affirm both.

FACTUAL AND PROCEDURAL BACKGROUND

This is an appeal from a judgment entered following the trial court's grant of a summary judgment motion brought by respondents Twentieth Century Fox Film Corporation and Langley Productions, Inc. (collectively "Fox"). The pivotal underlying facts are undisputed.

In 1989, appellant Paul Ingerson made an ill-fated trip to a "bad area of town" to buy marijuana. Instead of securing contraband, Ingerson was assaulted by a prospective seller, who tried to steal his motorcycle. Ingerson grabbed his keys and ran to a nearby pay phone where he called "911" to report the attempted theft.

Soon thereafter, two Los Angeles County Sheriff's Department deputies arrived accompanied by a camera crew

from Fox's reality-based program *Cops*. [1] Suspicious about the circumstances, the deputies asked Ingerson the reason he was in the area. Although evasive at first, Ingerson eventually admitted he had come to buy drugs. Ingerson and the deputies then proceeded down the block together and located the motorcycle where Ingerson had left it. The deputies told Ingerson he had come to a very dangerous area, and was lucky he had not been seriously hurt. They noted, and Ingerson agreed, everything had happened because he had tried to buy drugs. Ingerson, who was not arrested, agreed he should not have been in the area, thanked the deputies, and left. The film crew recorded the entire exchange, and it was soon broadcast in a four-minute segment ("segment") of the 30-minute-long *Cops* show.

Fox first televised the segment in January 1990. It was aired numerous times on Fox, and later in syndication between January 1990 and September 1999. [2] On the tape, Ingerson's face was obscured and he was not referred to by name; however, his voice, which he contends is distinctive, was not altered. The segment was broadcast in exactly the same fashion on each occasion, and has never borne a date-stamp or other feature to identify it as dated material. Ingerson never consented to Fox's publication of the segment containing his unaltered voice.

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1. Cops is a television series in which a camera crew accompanies on-duty police officers to videotape the officers' day-to-day interactions with citizens.

2. Only three broadcasts are at issue here: one each in the years 1997, 1998 and 1999. The episode containing the segment at issue here has not been telecast on the network or in syndication since September 1999.

Ingerson first saw the segment in 1990 and has seen it many times since. He has been told by several acquaintances they recognized him from the segment. Ingerson believes that, because people have seen the segment without a date stamp, they have formed the mistaken belief he remains involved in criminal activities. In December 2000, after an acquaintance introduced Ingerson to his wife as the "guy on *Cops*," Ingerson became fed up and filed this lawsuit.

Ingerson's first amended complaint contains six causes of action: (1) false light; (2) statutory appropriation under Civil Code section 3344 ("section 3344"); (3) common law appropriation; (4) public disclosure of private facts; (5) unjust enrichment/restitution; and (6) violation of the Unfair Competition Law, Business and Professions Code section 17200 ("UCL" or "section 17200"). Fox obtained summary judgment as to each cause of action. Ingerson appeals.

After obtaining summary judgment, Fox, represented by its insurers, filed a memorandum seeking approximately $ 3,100 in litigation costs. Ingerson moved to strike the cost memorandum, arguing he should not have to pay costs because they were "not actually . . . incurred by the 'prevailing party' as narrowly defined in" Code of Civil Procedure section 1032, subdivision (a)(4). He asserted "because the insurers that paid the costs on behalf of [Fox] were neither a 'party' nor a 'prevailing party' to this lawsuit, the insurers cannot recover the costs they paid." Otherwise, Ingerson asserted, the insurers would receive double payment: once from Fox's payment of premiums which allocated the risk of defense costs to its insurers, and again by requiring him to reimburse the insurers for performing their contractual obligation to advance the costs of their insureds' defense.

The trial court denied the motion and awarded costs to Fox. Ingerson appealed that order. We consolidated the two appeals.

DISCUSSION

In appeal from the judgment, Ingerson has voluntarily waived a number of his causes of action. In that appeal, the only matters which remain at issue are his claim of statutory appropriation in violation of section 3344 (the second cause of action), and two of the three counts alleging violations of the Unfair Competition Law (the sixth cause of action).[3] The other appeal is addressed to the propriety of the cost award.

1. The standard of review.

The standard of review on appeal from an order granting summary judgment is well-settled. A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aronson v. Kinsella (1997) 58 Cal.App.4th 254, 269* (*Aronson*); *Union Bank v. Superior Court (1995) 31 Cal.App.4th 573, 579* (*Union Bank*).) In making that determination, we review the court's decision de novo, considering all the evidence the parties offered in connection with the motion, except that which was properly excluded, and the uncontradicted inferences reasonably supported by

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3. The three "prongs" of the Unfair Competition Law (UCL) prohibit any business act or practice which is fraudulent, unlawful or unfair. On appeal, Ingerson has abandoned his claim that Fox's business practices at issue were unfair, and argues only that they were either fraudulent or unlawful.

that evidence. (*Artiglio v. Corning, Inc. (1998) 18 Cal.4th 604, 612, 957 P.2d 1313.)* On review, we strictly construe the moving party's evidence and liberally construe that of the opposing party, accepting as undisputed only those portions of the moving party's evidence which are uncontradicted. "Only when the inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial. 'Any doubts about the propriety of summary judgment . . . are generally resolved against granting the motion, because that allows the future development of the case and avoids errors.' [Citation.]" (*Binder v. Aetna Life Ins. Co. (1999) 75 Cal.App.4th 832, 839.)* Nevertheless, if it is correct on any ground, we must uphold the judgment, regardless of the reasons given by the trial court. We review the court's ruling, not its rationale. (*D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 19, 112 Cal. Rptr. 786, 520 P.2d 10* (*D'Amico*); *Biljac Associates v. First Interstate Bank (1990) 218 Cal. App. 3d 1410, 1419, 267 Cal. Rptr. 819* (*Biljac*); *Stratton v. First Nat. Life Ins. Co. (1989) 210 Cal. App. 3d 1071, 1083, 258 Cal. Rptr. 721.)*

2. Summary judgment was properly granted on Ingerson's statutory claim of appropriation.

Civil Code section 3344 provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for the purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as result thereof." (§ 3344, subd. (a).) The legislative prohibition against the unauthorized appropriation of one's

likeness was intended to complement, not supplant, the common law "right of publicity," which also permits recovery for the appropriation of a plaintiff's name or likeness. [4] (*Comedy III Productions, Inc. v. Gary Saderup, Inc. (2001) 25 Cal.4th 387, 391* (*Comedy III Productions*); *Eastwood v. Superior Court (1983) 149 Cal. App. 3d 409, 416-417, 198 Cal. Rptr. 342* (*Eastwood*).) The two causes of action are very similar but not identical, only the former is involved here. (*Eastwood, supra 149 Cal. App. 3d at pp. 417-418.)*

The elements of a common-law action are the unauthorized use of the plaintiff's identity to the defendant's

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4. The common-law right of publicity, now embodied in the Restatement, evolved from Dean Prosser's seminal article identifying appropriation as one of four species of the tort of invasion of privacy. (See *Comedy III Productions, supra, 25 Cal. 4th at p. 391, fn. 2,* citing Prosser, Privacy *(1960) 48 Cal. L.Rev. 383, 389; Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 24-25, 865 P.2d 633.)* The four species are intrusion, public disclosure of private facts, false light and appropriation. (See 1 McCarthy, *The Rights of Publicity and Privacy*, (2d ed. 2002) § § 1:3 to 1:24, pp. 1-2.1 through 1-36.)

Appropriation, the category at issue, is typically considered in two subparts, depending on the interest each seeks to protect: (1) "the right of publicity," which typically involves the appropriation of a celebrity's name or identity for commercial purposes and aims to protect the celebrity's property interest in his or her identity; and (2) "appropriation privacy," which ordinarily involves the unwanted and unpermitted use of a non-celebrity's name or likeness for advertising or other commercial purpose, and seeks to protect that individual's personal interest in privacy. Stated differently, appropriation privacy, which is at issue, is a personal injury whose damages are generally measured in terms of the mental anguish or embarrassment suffered by the plaintiff, whereas the injury suffered for violation of the "right of publicity" is a function of the commercial or property interest a celebrity has in the use of his or her identity. (*Id.* at § § 1:23, pp. 1-32 to 1-34, 5:58 to 5:65, pp. 5-106 to 5-122.)

advantage by appropriating the plaintiff's name, voice, likeness, etc., commercially or otherwise, and resulting injury. (*Id.* at p. 417, fn. 6.) The statutory cause of action for appropriation under section 3344 includes all the common-law elements, in addition to a knowing use of the plaintiff's name, likeness, etc. (*Id.* at pp. 417-418; § 3344, subd. (a).) Defendant's invasion of plaintiff's privacy may be actionable under either the statute or common-law whether or not the purpose is commercial. (See *KNB Enterprises v. Matthews (2000) 78 Cal.App.4th 362, 367-368, fn. 5.)*

The statute contains an express exemption for the unconsented use of another's name, voice, likeness, etc., "in connection with any news, public affairs, or sports broadcast or account, or any political campaign." (§ 3344, subd. (d).) This "public affairs" exemption is similar to the exception developed under the common law tort for publication of matters of "public interest." (*Dora v. Frontline Video, Inc. (1993) 15 Cal.App.4th 536, 542, 545; Montana v. San Jose Mercury News, Inc. (1995) 34 Cal.App.4th 790, 793-794* (*Montana*).)

Ingerson contends that Fox's unconsented and continued use of his unaltered voice in the segment violates section 3344. He also insists the judgment must be reversed because Fox cannot avail itself of the "public affairs" defense under subdivision (d) of that statute. [5] We disagree.

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5. The parties devote considerable attention to the applicability of section 3344 to the interesting but non-dispositive question of whether Fox's use of Ingerson's voice or "likeness" constituted commercial speech for purposes of a First Amendment analysis. While Fox's use of Ingerson's voice or likeness in connection with a reality-based show demonstrating

In support of its motion below, which was directed at Ingerson's common-law and statutory appropriation claims, Fox argued Ingerson inappropriately conflated the common-law "public interest" exception to liability with the statutory "public affairs" exception of section 3344, subdivision (d). The court concluded there were no triable factual issues as to Ingerson's section 3344 claim. It granted summary judgment "as to the entire action because of the public interest exception." Ingerson contends Fox may no longer avail itself of the statutory public affairs exception, because the trial court did not specifically find Fox's unauthorized use of Ingerson's voice fell within the "public affairs" exception of section 3344, subdivision (d), because Fox failed to file a protective cross-appeal from that portion of the judgment, and because he no longer seeks recovery on a theory of common-law appropriation. He is incorrect. As we stated above, on appeal from a grant of summary judgment, we exercise our

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some of the dangers posed by the use or acquisition of illicit drugs likely does not constitute commercial speech under the test recently articulated in *Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 960-962,* we need not reach that issue. Section 3344's statutory bar to appropriation clearly applies to both commercial and noncommercial speech. (See *Comedy III Productions, supra, 25 Cal.4th at p. 396* [finding a violation of section 3344 by artist sued for selling t-shirts bearing his drawings of the Three Stooges, even though the "case [did] not concern commercial speech"].)

Moreover, the defenses in section 3344, subdivision (d), are not coextensive with the First Amendment. On the contrary, we agree with the Ninth Circuit that those defenses were "designed to avoid First Amendment questions in the area of misappropriation by providing extra breathing space for the use of a person's name in connection with matters of public interest." (*New Kids on the Block v. News America Pub., Inc. (9th Cir. 1992) 971 F.2d 302, 309,* citing *Eastwood, supra, 149 Cal. App. 3d at p. 421.)*

independent judgment to determine whether a moving party is entitled to judgment as a matter of law. (*Aronson, supra, 58 Cal.App.4th at p. 269; Union Bank, supra, 31 Cal.App.4th at p. 579.)* We review the lower court's result, not its rationale, and must uphold the judgment if it is correct on any ground, regardless of the court's stated reasons. (*D'Amico, supra, 11 Cal.3d at p. 19; Biljac, supra, 218 Cal. App. 3d at p. 1419.)*

Fox contends its use of Ingerson's unaltered voice was in connection with a matter of "public affairs" within the meaning of section 3344, subdivision (d), and as such does not constitute a use for which Ingerson's consent was required. We agree.

Courts which have considered the question before us have indicated section 3344, subdivision (d) should be interpreted to cover a broad range of material. Some litigants, including Fox (below), might argue *Cops*' real-life depictions are akin to traditional news shows in that they videotape and broadcast actual events which transpire during a police officer's average "working day." Even if *Cops* "is not a traditional news show, it is plainly a 'news or public affairs' broadcast in the broad sense and is therefore entitled to protection." (See *Baugh v. CBS, Inc. (N.D.Cal. 1993) 828 F. Supp. 745, 754* [concluding television news magazine program *Street Stories,* which broadcast actual events in plaintiff's home after she called police to report domestic violence, as part of a segment on victim assistance programs, was either a traditional news program or a public affairs broadcast].)

Dora v. Frontline Video, Inc., supra, 15 Cal.App.4th 536 (*Dora*), *Gionfriddo v. Major League Baseball (2001) 94 Cal.App.4th 400* (*Gionfriddo*), and *Shulman v. Group W Productions, Inc. (1998) 18 Cal.4th 200, 955 P.2d 469*

(*Shulman*), guide our decision. In *Dora*, the plaintiff, a "legendary figure in surfing" sued the producer of a video documentary on surfing which contained footage of plaintiff, alleging common law and statutory appropriation for the unauthorized use of his name, voice and likeness. (*Dora, supra, 15 Cal.App.4th at pp. 540-541.)* The court first found that, because the documentary was about a matter of public interest (surfing), plaintiff's common law claim was barred because the producer was protected by the First Amendment. (*Id. at p. 544.)* Turning to the statutory appropriation claim, the court found the term "public affairs" required a broad interpretation and "included things that would not necessarily be considered news . . . . [It] also presumed that the term 'public affairs' was intended to mean something less important than news . . . . As has been established in the cases involving common law privacy and appropriation, the public is interested in and constitutionally entitled to know about things, people, and events that affect it." (*Id. at pp. 545-546.)*

In *Gionfriddo*, former professional baseball players sued the league for common law and statutory appropriation for disseminating factual data and statistics about the players, as well as their photographs, and descriptions and video depictions of their play. (*Gionfriddo, supra, 94 Cal.App.4th at pp. 405-406.)* Weighing the fact that defendants did no more than make historical information available to the public, against the significant public interest in the country's "national pastime," the court found plaintiffs failed to establish a common law claim. "Balancing plaintiffs' negligible economic interests [in exploiting their own celebrity] against the public's enduring fascination with baseball's past, we conclude that the public interest favoring the free dissemination of information regarding baseball's history far outweighs any proprietary interests at stake." (*Id. at p. 415.)*

In addition, relying on *Dora* and *Montana,* in which the court found that a newspaper's sale of news accounts of a football team's Superbowl victories reproduced in poster form was a " 'form of public interest presentation to which protection [under § 3344, subd. (d)] must be extended,' " the court found defendants' use also qualified as "public affairs" within the meaning of section 3344, subdivision (d): "Baseball . . . is . . . 'the national pastime.' In view of baseball's pervasive influence on our culture, we conclude that the types of uses raised in the record before us are among the 'public affairs' uses exempt from consent under section 3344, subdivision (d)." (*Gionfriddo, supra, 94 Cal.App.4th at p. 416.)*

Finally, in *Shulman*, a mother and her son were injured in a traffic accident and received emergency medical assistance from a rescue helicopter crew accompanied by a film crew. (*Shulman, 18 Cal.4th at p. 209.)* Footage of plaintiffs' rescue, which included shots of one plaintiff's face, her first name and some of her own words, was later aired on a television program depicting emergency responses. Plaintiffs sued for publication of private facts, a tort closely related to appropriation. In a plurality opinion, the Supreme Court found "the subject matter of the broadcast," which involved the "rescue and medical treatment of accident victims . . ., [and] involving . . . a critical service that any member of the public may someday need," and "highlighted some of the challenges facing emergency workers dealing with serious accidents," was "as a whole []of legitimate public concern." (*Id. at p. 228.)* Accordingly, the constitutional protections for matters of public interest precluded imposing tort liability for defendants' broadcast of the footage. (*Id. at pp. 228-229.)* Although, as Ingerson points out, *Shulman* was only a plurality opinion, its sound reasoning has often been followed. (See e.g., *Sanders v. American Broadcasting*

Companies, Inc. (1999) 20 Cal.4th 907, 914, 978 P.2d 67; Wilkins v. National Broadcasting Co., Inc. (1999) 71 Cal.App.4th 1066, 1084-1085; Anti-Defamation League of B'nai B'rith v. Superior Court (1998) 67 Cal.App.4th 1072, 1086-1087; Solano v. Playgirl, Inc. (9th Cir. 2002) 292 F.3d 1078, 1089, fn. 8; Veilleux v. National Broadcasting Co., Inc. (1st Cir. 2000) 206 F.3d 92, 132.)

We conclude that, taken together, these cases teach that the public interest and public affairs exceptions are closely related, if not identical, and the same reasons underlie their application to bar Ingerson's appropriation claims, whether statutory or common law. Certainly, if pastimes such as surfing and baseball are so pervasive they qualify as matters of "public affairs," so must a program highlighting dangers posed by use of illicit drugs.

In addition, as in *Shulman*, the segment shows the actual response of public servants to a citizen's emergency call for assistance, and shows the police officers performing a "critical service . . . any member of the public may someday need." (*Shulman, supra, 18 Cal.4th at p. 228.)* The significance of the message portrayed in the segment is not lessened because the events it depicts occurred more than a decade ago. Under the circumstances, we conclude the educational value of the material contained in the segment is, as a matter of law, a subject of "public affairs" exempt from liability under section 3344, subdivision (d). Accordingly, summary judgment was properly granted on this basis alone on Ingerson's statutory claim of appropriation.

For reasons articulated in *Shulman*, we need not address Ingerson's contention it was not necessary for Fox to use *his* voice, and that Fox could have altered his voice in the segment and still have communicated its educational

message. In *Shulman,* the court also declined the invitation to decide that, because the tape could have been edited to exclude all or most of the offensive material, inclusion of the suffering depicted by plaintiff's own face and words was not *necessary* to enable the public to understand the significance of the event: "The standard . . . is not necessity. That the broadcast *could* have been edited . . . is not determinative. Nor is the possibility that members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press." [6] *(18 Cal.4th at p. 229.)*

3. Summary judgment was proper on Ingerson's claim that Fox's use of the segment violated the "unlawful" or "fraudulent" prongs of the UCL.

Ingerson also contends that, by displaying the segment without indicating the events it depicts occurred over a decade ago, Fox violated the state's unfair competition law because viewers will likely be misled that the old events depicted in the segment occurred recently.

Under the UCL, any unlawful, unfair or fraudulent

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6. Our conclusion makes it unnecessary to address the parties' arguments as to whether summary judgment was properly granted based on the exemption in section 3344, subdivision (e). That subdivision provides that the use of another's likeness, etc. in a commercial medium is not a use for which consent is required solely because the material in which such use is contained is commercially sponsored or contains advertising. Rather, under this subdivision, it is a question of fact whether the use of another's likeness was "so directly connected with the commercial sponsorship or . . . paid advertising" that consent under § 3344, subd. (a) is required. We have also considered, but find no merit in, Ingerson's remaining contentions of error.

business act or practice is deemed "unfair competition." (Bus. & Prof. Code, § 17200.) Because the statute is written in the disjunctive, liability may be imposed on any one of the three prongs independent of the others. (*Podolsky v. First Healthcare Corp. (1996) 50 Cal.App.4th 632, 647.)*

a. Ingerson has not shown a violation of the "unlawful" prong, and has abandoned his contention that Fox engaged in "unfair" business practices.

An unlawful business practices proscribed by the UCL "includes ' " anything that can properly be called a business practice and that at the same time is forbidden by law." ' [Citation.]" (*Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 383, 826 P.2d 730.)*

As explained above, Ingerson has failed to show Fox's use of the segment violated section 3344. Ingerson acknowledges that his claim for violation of the "unlawful" prong of the UCL is premised entirely on his ability to prevail under section 3344. Accordingly, Ingerson failed to show Fox's use of the segment was actionable under the "unlawful" prong of the UCL.

We also note that, on appeal, Ingerson expressly abandoned his claim that Fox engaged in actionable "unfair" business practices. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 186-187, 973 P.2d 527* [concluding a finding of unfairness under section 17200 must be tethered to some legislatively declared policy or based on proof of some actual or threatened impact on competition].)

b. Summary judgment was also proper as to UCL's "fraud" prong.

As explained in *Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 833 P.2d 545* (*Bank of the West*):

> "The Legislature intended the "sweeping language" [in the UCL] to include "'anything that can be properly called a business practice and that at the same time is forbidden by law.'" [Citations.] In drafting the act, the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity. As a result, to state a claim under the act, one need not plead and prove the elements of a tort. Instead, one need only show that "members of the public are likely to be deceived." [Citations.]

(*Bank of the West* at pp. 1266-1267; see also *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561-567, 950 P.2d 1086.)

The term "fraud," as used in section 17200, is not predicated upon proof of the common law tort of fraud or deception, but simply means whether the public is likely to be deceived. (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660; Bank of the West, supra, 2 Cal.4th at pp. 1266-1267.)* Accordingly, a plaintiff can prevail on a case of "fraudulent" business practices without the necessity of demonstrating intent, scienter, actual reliance or injury. (*Schnall v. Hertz Corp. (2000) 78 Cal.App.4th 1144, 1167-1168.)* Even actual deception is not necessary. All that is required is proof that reasonable "members of the public are likely to be deceived." (*Bank of the West, supra, 2 Cal.4th at p. 1267.)*

Despite this low threshold of proof, to prevail on a claim for violation of section 17200, it is not sufficient for a

plaintiff to show that a defendant's conduct *could* mislead the public; he must show the defendant's practices were *likely to* mislead the public. (See *Haskell v. Time, Inc. (E.D.Cal. 1997) 965 F. Supp. 1398, 1406-1407* (*Haskell*) [deciding claim under § 17200]; *Southwest Sunsites, Inc. v. F.T.C. (9th Cir. 1986) 785 F.2d 1431, 1436* [noting plaintiff was required to show probable, not merely possible, deception to prove a violation of federal act analogous to UCL].) "Anecdotal evidence alone is insufficient to prove that the public is likely to be misled." (*Haskell, supra, 965 F. Supp. at p. 1407,* citing *William H. Morris Co. v. Group W, Inc. (9th Cir. 1995) 66 F.3d 255, 258.)* Rather, to prevail, a plaintiff must provide "substantial evidentiary support that anyone was actually misled or likely to be misled." (*South Bay Chevrolet v. General Motors Acceptance Corp. (1999) 72 Cal.App.4th 861, 889* (*South Bay Chevrolet*); see also *Haskell, supra, 965 F. Supp. at p. 1407* [plaintiff must show by extrinsic evidence the challenged practice tends to mislead consumers]; *Johnson & Johnson * Merck v. Smithkline Beecham (2d Cir. 1992) 960 F.2d 294, 297-298* [concluding that, to state a cognizable claim of fraud, plaintiff must show "a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement"].) Ingerson has not satisfied this evidentiary burden.

In support of its argument that reasonable viewers are not likely to be misled as to the timing of the events depicted in the segment, Fox offered the following: First, since 1993, episodes of the segment have aired only as syndicated repeats; syndication, by definition, is "old" television. Second, one viewing the episode of which the segment is part can easily see the events depicted are not recent. That episode is dedicated to the memory of a deputy who died in 1988, and displays a 1989 copyright date at the

end. In addition, a service station sign visible behind Ingerson during his interaction with the deputies, prominently displays a gasoline price of $ .79 per gallon, a price which even Ingerson has not seen for at least 12 years.

In response, Ingerson offered declarations prepared in 2001 by his brother and mother. Ingerson's brother, who claims Ingerson "has been recognized on numerous occasions by the sound of his voice," whose television viewing habits are "typical of the general viewing audience," [7] and who knew about the broadcast before it was televised, declared: "If my brother had not informed me of the timing of the events of the COPS episode, I would have never been aware of the timing of the show." Ingerson's mother, who was also aware of the broadcast by the "early 1990's," declared "on [her] own knowledge . . . the segment . . ., especially in absence of date stamps, caused a substantial number of people to mistakenly associate [Ingerson's] unflattering past with his new rehabilitated life today." No evidence was offered to substantiate Ms. Ingerson's hearsay statement. [8]

At best, Ingerson provided only speculative, anecdotal evidence that anyone had been or was likely to be misled as to the timing of the segment. Such "evidence" was insufficient to satisfy his obligation to provide "substantial evidentiary support" to show viewers were likely to be misled as to the timing of the segment. (*South Bay Chevrolet, supra, 72 Cal.App.4th at p. 889; Haskell, supra, 965 F. Supp. at p.*

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7. With respect to viewers' propensity to "channel surf."

8. Ingerson also offered his own and his father's declarations, but neither addressed the issue of whether the segment had likely misled viewers as to the timing of the show.

1407.) Accordingly, summary judgment was proper as to his claim that Fox violated the "fraud" prong of the UCL.

4. Litigation costs were properly awarded.

Finally, Ingerson insists the court erred in awarding litigation costs. He does not dispute Fox is the "prevailing party" as the term is defined in the Code of Civil Procedure, nor the fact that, as such, Fox is entitled to recover costs. (Code Civ. Proc., § 1032, subd. (a)(4) [defining "prevailing party"]; § 1032, subd. (b) ["Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs . . . ."].) Additionally, his argument does not hinge on the fact that it was Fox's insurers, not Fox itself, who actually paid the costs Fox incurred defending this action. To the contrary, Ingerson concedes, as he must, that reasonably necessary litigation "costs are allowable if incurred whether or not paid." (Code Civ. Proc., § 1033.5, subd. (c)(1).) His argument is that, because the insurers who actually paid Fox's litigation costs were not parties to this action, they cannot be deemed "prevailing parties" for purposes of an entitlement to costs. In another novel argument, advanced for the first time on appeal, Ingerson argues that "regardless of section 1032(b)'s text . . . and regardless of § 1033.5(c)(1) . . . various public policies based on insurance laws displace the application of these two general/default rules in limited circumstances such as in here."

We reject Ingerson's attempt to obtain a windfall by avoiding his duty to pay the costs of litigation that has been determined meritless by the trial court, and now by this court. Ingerson does not dispute the amount or propriety of Fox's litigation costs, nor his obligation to pay them. Instead, he attempts to avoid payment by relying on the fact that Fox had

the foresight to protect its interests and obtain coverage for matters such as this. The issue of whether Fox or its insurers will ultimately retain the proceeds of Ingerson's cost payment is not before us. That question, the answer to which lies in the terms of Fox's contractual agreement with its insurers, is of no import here. [9] The fact remains that Ingerson, as the non-prevailing party, indisputably owes litigation costs to Fox, the prevailing party. The ultimate repository of those funds is a matter of no concern to him or us.

Support for our conclusion also lies in the principles underlying analogous situations in which the "collateral source rule" applies. That rule "provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Hrnjak v. Graymar, Inc. (1971) 4 Cal.3d 725, 729, 94 Cal. Rptr. 623, 484 P.2d 599* (*Hrnjak*); *Pacific Gas & Electric Co. v. Superior Court (1994) 28 Cal.App.4th 174, 176.)* In a typical application, the collateral source rule applies to preclude a tortfeasor defendant from presenting evidence that an injured plaintiff's medical expenses have been paid by an independent source. (*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal.3d 1, 9, 84 Cal. Rptr. 173, 465 P.2d 61.)* While the rule

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9. Typically, an insurer is entitled to recover advanced costs under the principle of subrogation. "Subrogation is the insurer's right to be put in the position of the insured, in order to recover from third parties who are legally responsible to the insured for a loss paid by the insurer. [Citation.]" (*Barnes v. Independent Auto. Dealers of California (9th Cir. 1995) 64 F.3d 1389, 1392.)* "Where a subrogation provision exists, an insurer may recoup its payments directly from the tortfeasor or from the proceeds of the insured's action against a tortfeasor. [Citation.]" (*Pacific Gas & Electric Co. v. Superior Court (1994) 28 Cal.App.4th 174, 183.)*

effectively allows a plaintiff to receive a double recovery, the idea behind it that "tortfeasors should not recover a windfall from the thrift and foresight of persons who have . . . secured insurance . . . benefits to provide for themselves . . . . A contrary rule, it is feared, would misallocate liability for tort-caused losses and discourage people from obtaining benefits from independent collateral sources. [Citation.]" (*Arambula v. Wells (1999) 72 Cal.App.4th 1006, 1009; Hrnjak, supra, 4 Cal.3d at p. 730* [the "collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities . . . ."].) To permit Ingerson to escape his obligation to reimburse Fox for litigation expenses it incurred just because those costs were advanced by its insurer, would similarly discourage potential defendants from obtaining insurance to meet just this eventuality. That is a result we cannot sanction.

Our conclusion is not altered by Ingerson's argument that Fox's right to recover costs under the "general" or "default" rules of Code of Civil Procedure sections 1032 and 1033.5 must yield to more "specific" governing provisions of Civil Code section 2778. The latter statute merely provides that "in the interpretation of a contract of indemnity," a contractual provision for "indemnity against claims, or demands, or liability . . . embraces the costs of defense against such claims . . . ." (Civ. Code, § 2778(3).) This rule does no more than provide guidance for courts construing indemnity agreements, a task we have not undertaken.

The cost award was proper. The fortuity that Fox was insured cannot be used to shield Ingerson from the obligation to pay the expenses Fox incurred defending this meritless litigation.

DISPOSITION

The judgment and the post-judgment order on costs are affirmed. Respondents are to recover their costs of appeal.

BOLAND, J. We concur: COOPER, P.J., RUBIN, J.

APPENDIX B

Trial Court's Order Granting Summary Judgment

Superior Court of California, County of Los Angeles
Date: 06/19/01 Dept. 50
Honorable J. Stephen Czuleger M. Mata, Deputy Clerk
L.Caterio, CA, Deputy Sheriff K. Thibodeaux, Reporter

BC 241596
Paul Ingerson vs. Twentieth Century Fox Film Corp.

Plaintiff Counsel: Robert Cooper
Defendant Counsel: Robert H. Rotstein; Dan Chammas

NATURE OF PROCEEDINGS:

Motion of Defendants, Twentieth Century Fox Film Corporation and Langley Productions Inc., for Summary Judgment or Alternatively, Summary Adjudication of Issues.

Matter is called for hearing. The Court has read and considered the motion, opposition, and reply. The Court has also watched the videotape that was submitted. Matter is argued. Summary adjudication is granted on the 1st, 3rd and 4th causes of action on the Statute of Limitations. As to the second cause of action, there is no triable issue of fact. Summary Judgment is granted as to the entire action because of the public interest exception. Counsel for defendant is to give notice and prepare an Order, submitting it to opposing counsel as to form and content, filing it within ten (10) days.

[Court Seal: Minutes Entered 06/19/01 County Clerk]

APPENDIX C

Trial Court's Judgment Granting Summary Judgment

Superior Court of the State of California BC 241596
[Court Seal: Filed Los Angeles Superior Court, July 6, 2001, John A. Clarke, Clerk, by M. Mata, Deputy]

JUDGMENT

PAUL INGERSON, an individual, Plaintiff,

v.

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation; LANGLEY PRODUCTIONS INC., a California Corporation, and DOES 1-50, Defendants.

This action came on for hearing before the Court on June 19, 2001, Hon. J. Stephen Czuleger presiding, on motion for summary judgment, or alternatively summary adjudication of issues, brought by Defendants Twentieth Century Fox Film Corporation and Langley Productions Inc. ("Defendants"). The evidence presented having been fully considered, the issues having been fully heard, and a decision having been fully rendered, IT IS ORDERED AND ADJUDGED that Plaintiff take nothing by ways of his Complaint, that the action be dismissed on the merits, and that Defendants recover their costs.

DATE: July 6, 2001
/s/ J. Stephen Czuleger
Superior Court Judge

APPENDIX D

DENIAL OF DISCRETIONARY REVIEW

Court of Appeal, Second District, Division Eight
Nos. B152689, B153595

S113742

IN THE SUPREME COURT OF CALIFORNIA

En Banc

PAUL INGERSON, Plaintiff and Appellant,
v.

TWENTIETH CENTURY FOX FILM CORPORATION, et. al., Defendants and Respondents.

Petition for review DENIED.

[Court Seal: Supreme Court, Fredrick K. Ohlrich, Clerk Deputy, Filed April 9, 2003]

/s/ George, Chief Justice

APPENDIX E

CONSTITUTIONAL & STATUTORY TEXTS

U.S. Const. amend. I:

"Congress shall make no law * * * abridging the freedom of speech, or of the press."

U.S. Const. amend. XIV, § 1:

"No State shall * * * deprive any person of life, liberty, or property, without due process of law."

California Business & Profession Code § 17200:

"As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

California Civil Code § 3344:

"(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.

In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

(d) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a)."